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89-1696

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PEABODY COAL COMPANY AND
OLD REPUBLIC INSURANCE COMPANY,

Petitioners,

v.

HUBERT C. TAYLOR AND DIRECTOR, OFFICE
OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

On December 12, 1988, a writ of certiorari was granted remanding this case for consideration in light of *Pittston Coal Group v. Sebben*, 109 S. Ct. 414 (1988). *Taylor v. Peabody Coal Co.*, 109 S. Ct. 548 (1988). The questions now presented are:

1. Are the rebuttal provisions of the United States Department of Labor's black lung "interim presumption" (20 C.F.R. § 727.203(b) (1989)) invalid under 30 U.S.C. § 902(f)(2) because they require the consideration of all relevant medical evidence in determining whether certain claimants are entitled to benefits under the Black Lung Benefits Act, 30 U.S.C. §§ 901-945.

2. If 30 U.S.C. § 902(f)(2) prohibits the consideration of any relevant medical evidence proving that the miner does not suffer from black lung disease or any related disability or death, then does 30 U.S.C. § 902(f)(2) violate the rights of coal mine operators and their insurers under the Due Process Clause of the Fifth Amendment to the Constitution of the United States by requiring them to pay benefits to black lung claimants for no valid reason.

LIST OF PARTIES AND RULE 29.1 STATEMENT

Hubert C. Taylor ("Taylor") is a claimant for benefits under the Black Lung Benefits Act. He was the petitioner in the Seventh Circuit and is a respondent here. The Peabody Coal Company ("Peabody") is the mine owner that last employed Taylor. The Old Republic Insurance Company ("Old Republic") is Peabody's workers' compensation insurance carrier for certain claims, including Taylor's. Peabody and Old Republic were the respondents below and are co-petitioners in this Court. The Director, Office of Workers' Compensation Programs, is the administrator of the black lung program and is a statutory party in all black lung claims. 30 U.S.C. § 932(k).

Peabody is a wholly-owned subsidiary of the Peabody Holding Company, Incorporated. Old Republic is a wholly-owned subsidiary of the Old Republic International Corporation.

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UNITED STATES DEPARTMENT OF LABOR,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Peabody Coal Company and Old Republic Insurance Company respectfully petition for a writ of certiorari to review the judgment and opinions of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinions of the Seventh Circuit are reported at 892 F.2d 503 (App. 4a-14a), and 838 F.2d 227 (App. 18a-22a). The Order of the Court of Appeals denying rehearing is unreported (App. 1a-2a). The Order of the Court of Appeals denying briefing and argument on remand is unreported (App. 15a). The Memorandum Decision of this Court granting the writ of certiorari and remanding the case to the Court of Appeals is reported at 109 S. Ct. 548 (App. 23a). The Decision and Order of the Benefits Review Board, United States Department of Labor, is unreported (App. 24a-27a).

The decision of the Administrative Law Judge ("ALJ") is unreported (App. 28a-40a).

JURISDICTION

The judgment of the Court of Appeals on remand from this Court was rendered on August 28, 1989. The Court of Appeals extended the time for filing petitions for rehearing to and including October 2, 1989 (App. 3a). The Government and Peabody both filed timely petitions for rehearing on September 29, 1989. The rehearing petitions were denied by Order dated February 1, 1990 (App. 1a-2a). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The following authorities are reprinted in the Appendix:

1. The Fifth Amendment to the Constitution of the United States (App. 41a).

2. Section 401(a) of the Black Lung Benefits Act, 30 U.S.C. § 901(a) (1982) (App. 42a).

3. Section 402(f) of the Black Lung Benefits Act, 30 U.S.C. § 902(f) (1982) (App. 43a).

4. Section 413(b) of the Black Lung Benefits Act, 30 U.S.C. § 923(b) (1982) (App. 45a).

5. Section 422(c) of the Black Lung Benefits Act, 30 U.S.C. § 932(c) (1982) (App. 47a).

6. The Social Security Administration Interim Presumption, 20 C.F.R. § 410.490 (1989) (App. 48a).

7. The Department of Labor Interim Presumption, 20 C.F.R. § 727.203 (1989) (App. 51a).

STATEMENT OF THE CASE

A. Introduction

This petition asks the Court to examine once again the controversial black lung "interim presumptions," this time to resolve the key question left open in *Pittston Coal Group v. Sebben*, 109 S. Ct. 414, 423 (1988). The question is whether mine owners and their insurers are afforded any realistic opportunity to rebut an interim presumption in non-meritorious benefit claims. The Seventh Circuit held that "medical" proof demonstrating that a coal miner does not suffer from, is not disabled by, or did not die due to black lung disease is generally incompetent as a matter of law to establish a claimant's ineligibility for benefits once the presumption is raised by the claimant. Since medical proof is, by and large, the only proof that matters, the decision below mandates the payment of black lung disability or death benefits by an employer notwithstanding the proven absence of occupational disease, related disability or death. Petitioners believe this ruling is incorrect and unjust, and seek its review by this Court.

B. Statutory Background

The Black Lung Benefits Act,[1] 30 U.S.C. §§ 901-945 (1982 & Supp. V 1987) (the "Act"), establishes a federal program to provide benefits to coal miners and their families on account of total disability or death due to coal mine employment related pneumoconiosis ("black lung" disease).

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[1] Title IV of the Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, 83 Stat. 742, 792 (1969), *as amended by* the Black Lung Benefits Act of 1972, Pub. L. No. 92-303, 86 Stat. 150 (1972), the Black Lung Benefits Revenue Act of 1977, Pub. L. No. 95-227, 92 Stat. 11 (1978), the Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92 Stat. 95 (1978), the Black Lung Benefits Revenue Act of 1981 and the Black Lung Benefits Amendments of 1981, Pub. L. No. 97-119, 95 Stat. 1635 (1982), the Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 13203, 100 Stat. 312, 313 (1986), and the Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, § 10712(a), 101 Stat. 1330, 1797 (1987).

30 U.S.C. § 901(a). The program is divided into two parts. Claims filed from January 1, 1970 to June 30, 1973 are called "Part B" claims. Part B claims were filed with and adjudicated by the Social Security Administration ("SSA"). Benefits awarded are paid by the U.S. Treasury. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 8 (1976).

Claims filed after December 31, 1973,[2] are filed under an approved state workers' compensation law,[3] or if no law has been approved in the miner's state, with the U.S. Department of Labor ("DOL" or "Labor"). Claims filed with DOL are called "Part C" claims.[4] Benefits awarded in a Part C claim are paid directly by a mine owner or its insurer, 30 U.S.C. §§ 932(c), 933, or by a coal industry financed fund administered by DOL, *id.* § 934.[5]

In all segments of the program, benefit entitlements are determined in accordance with agency regulations setting forth eligibility criteria, medical standards and rules of proof In general, there are three elements of entitlement: (1) the miner must have coal mine employment related pneumoconiosis, (2) the miner must be totally disabled or deceased, and

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[2] Claims filed between July 1, 1973 and December 31, 1973 were filed with SSA but adjudicated by DOL. They became Part C claims on January 1, 1974. 30 U.S.C. § 925.

[3] 30 U.S.C. § 931. No state's law has been approved.

[4] Part B claims are adjudicated in accordance with procedures contained in the Social Security Act. 42 U.S.C. §§ 404-408, *incorporated by reference into* 30 U.S.C. § 923(b). Part C claims are adjudicated in accordance with the adversarial litigation procedures contained in the Longshore Act. 33 U.S.C. §§ 919, 921, *incorporated by reference into* 30 U.S.C. § 932(a). The on-the-record hearing provisions of the Administrative Procedure Act ("APA") apply in Part C claims. 5 U.S.C. § 554, *incorporated by reference into* 33 U.S.C. § 919(d).

[5] The Black Lung Disability Trust Fund is financed by a producer's tax on coal. 26 U.S.C. §§ 4121, 9501. The Fund is liable for claims if the miner last worked prior to January 1, 1970 or if no financially responsible mine owner or carrier can be found. 30 U.S.C. §§ 932(c), 934(a).

(3) the total disability or death must be attributable to pneumoconiosis. *Mullins Coal Co. v. Director, Office of Workers' Compensation Programs*, 484 U.S. 135, 141 (1987).

Originally, only the Secretary of Health Education and Welfare ("HEW") had authority to write eligibility regulations. 30 U.S.C. §§ 921(a), 932(b). In 1972, HEW published two sets of regulations. HEW's permanent regulations applied in both SSA and DOL claims. 20 C.F.R. §§ 410.401-410.476 (1989). A second set of "interim" standards applied only in SSA claims. *Id.* § 410.490. HEW was asked by an individual member of Congress to amend its rules to permit DOL to use the interim rules in that agency's claims. HEW refused on the grounds that it was unnecessary and might be constitutionally impermissible to apply the interim rules in claims involving mine owners. *See* H.R. Rep. No. 151, 95th Cong., 1st Sess. 15-19 (1977), *reprinted in* House Comm. on Education and Labor, 96th Cong., 1st & 2d Sess., *Black Lung Benefits Reform Act and Black Lung Benefits Revenue Act of 1977* at 508, 522-26 (Comm. Print 1979). DOL believed that the interim rules could be applied rationally and construed constitutionally and so informed Congress. *Id.* ("Any coal operator [may] present sound medical evidence tending to rebut the presumption of eligibility created by the interim presumption. . . . ").

In 1978, Congress authorized DOL to write its own eligibility rules, 30 U.S.C. § 902(f)(1), and also mandated a review of all pending and previously denied claims, *id.* § 945. Claims reviewed by DOL and a group of newly filed claims were to be considered under criteria that "shall not be more restrictive than the criteria applicable to a claim filed on June 30, 1973." *Id.* § 902(f)(2). DOL then promulgated interim regulations to comply with section 902(f)(2), *see* 20 C.F.R. § 727.203 (1989), and permanent regulations, *see id.* Part 718.

The SSA and DOL interim regulations are similar, but not identical. Both regulations erect rebuttable presumptions of entitlement. In both, the claimant proves predicate facts,

eligibility is presumed, and ultimate facts are decided in the rebuttal inquiry. The employer bears the burden of persuasion in the rebuttal phase. *See, e.g., Gibas v. Saginaw Mining Co.*, 748 F.2d 1112, 1120 (6th Cir. 1984), *cert. denied*, 471 U.S. 1116 (1985). The SSA rule may be invoked if the claimant establishes pneumoconiosis by x-ray, biopsy or autopsy evidence, or if the miner meets published values on pulmonary function tests. 20 C.F.R. § 410.490(b). Labor's rule follows this same format, but adds three additional bases for invocation (arterial blood gas tests, medical opinion evidence, and lay evidence in certain survivor's claims). *Id.* § 727.203(a). Labor's rule required at least ten years of coal mine employment for invocation by any method, while SSA's allowed a shorter term miner to invoke by x-ray, autopsy or biopsy evidence if additional evidence connected abnormal findings to coal dust exposure. *See Pittston Coal Group*, 109 S. Ct. at 418-19.

SSA's rule states that the presumption may be rebutted by evidence showing that the miner is still working or is able to work. The SSA rebuttal rule also cross-references certain provisions in the SSA permanent regulations. 20 C.F.R. § 410.490(c)(1), (2). SSA's rule makes no statement limiting the sort of evidence that may prove rebuttal facts. The Labor rebuttal rule generally follows section 410.490(c), but adds several provisions to it. First, the Labor rule states that all relevant medical evidence shall be considered. *Id.* § 727.203(b). The Labor rule also provides that rebuttal may be established by proof showing that (1) the miner's disability or death did not arise in whole or in part out of coal mine employment, or (2) that the miner did not or does not have pneumoconiosis. *Id.* § 727.203(b)(3), (4).[6]

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[6] Benefits are provided by the Act on account of total disability *or* death due to pneumoconiosis. 30 U.S.C. § 901(a). Labor's rule specifically accommodates rebuttal in a claim filed by a survivor of a miner. SSA's rule does not specifically do so, but SSA did not interpret its rules to preclude rebuttal in a case filed on behalf of a deceased miner. *See Farmer v. Weinberger*, 519 F.2d 627, 630 (6th Cir. 1975).

The DOL presumption is applicable in approximately 424,000 claims. *Problems Relating to the Insolvency of the Black Lung Disability Trust Fund: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means*, 97th Cong., 1st Sess. 186 (1981).

C. Background of the Litigation

In *Pittston Coal Group v. Sebben*, this Court invalidated DOL's absolute bar to invocation in the case of a miner with abnormal x-ray, biopsy, or autopsy findings, but less than ten years of coal mine employment. The Court held that the undisputed tension between the SSA and DOL "ten year" rules was prohibited by 30 U.S.C. § 902(f)(2). 109 S. Ct. at 420-23.

In a case consolidated with *Pittston Coal Group*, the Fourth Circuit held that the SSA rule, including both its invocation and rebuttal provisions, simply applied in DOL's claims. *Broyles v. Director, Office of Workers' Compensation Programs*, 824 F.2d 327, 329 (4th Cir. 1987), *aff'd in part sub nom. Pittston Coal Group*, 109 S. Ct. at 425.[7] The petitions for certiorari and the briefs filed by the Government and private petitioners in *Pittston Coal Group* and *Broyles* disputed the Fourth Circuit's de facto invalidation of DOL's rebuttal rules. The private petitioners also asserted that application of SSA's rebuttal rules, as they were interpreted by the Fourth Circuit, deprived mine owners and insurers of constitutional rights. The Solicitor General agreed that the Fourth Circuit's treatment of the question was constitutionally troublesome.[8]

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[7] Specifically, the Fourth Circuit held that the SSA presumption could be rebutted only by proof that the miner was working or able to work. Since DOL's rebuttal provisions apparently went beyond these parameters, they too were more restrictive than the SSA rules and could not stand. *Broyles*, 824 F.2d at 329.

[8] *See* Government's Petition for a Writ of Certiorari at 17 n.10, *Director, Office of Workers' Compensation Programs v. Broyles*, 109 S. Ct. 414 (1988) (No. 87-1095); Brief for the Federal Petitioners at 26, *Pittston Coal Group*, 109 S. Ct. 414 (1988) (No. 87-821).

The black lung claimants involved in *Pittston Coal Group* and *Broyles*, however, conceded that DOL's rebuttal rules, although perhaps more restrictive than SSA's, were, nevertheless, authorized by the Act and valid. For these reasons, this Court found it unnecessary to consider the validity of DOL's rebuttal rules, to "reconcile their putative validity" with the holding in *Pittston Coal Group*, or to address the due process concerns alleged. 109 S. Ct. at 422-23.

Prior to *Pittston Coal Group*, the Seventh Circuit held that the invocation difference between the SSA and DOL presumptions did not violate 30 U.S.C. § 902(f)(2). *Strike v. Director, Office of Workers' Compensation Programs*, 817 F.2d 395, 404-05 (7th Cir. 1987). Hubert Taylor was found ineligible for benefits under the DOL presumption on the strength of persuasive rebutting medical evidence demonstrating that he is not totally disabled by pneumoconiosis. Taylor appealed to the Seventh Circuit to seek a readjudication of his case under the SSA/Part B presumption. Relying on *Strike*, the Seventh Circuit denied relief. *Taylor v. Peabody Coal Co.*, 838 F.2d 227, 229 (7th Cir. 1988). Taylor filed a petition for writ of certiorari. After the decision in *Pittston Coal Group*, this Court granted the writ and remanded. *Taylor v. Peabody Coal Co.*, 109 S. Ct. 548 (1988).

D. Proceedings Post-Remand

On August 28, 1989, the Seventh Circuit reversed the denial of benefits and reinstated the award made by the ALJ

under section 410.490.[9] *Taylor v. Peabody Coal Co.*, 892 F.2d 503 (7th Cir. 1989) ("*Taylor II*"). The Seventh Circuit previously observed that the SSA presumption could not be rebutted by medical evidence. *Cook v. Director, Office of Workers' Compensation Programs*, 816 F.2d 1182, 1185 (7th Cir. 1987). Relying on *Cook*, the court below noted:

> Because the Labor rebuttal rules allow the consideration of medical evidence on rebuttal, while the HEW rebuttal rules do not, the former are clearly more restrictive than the latter.

Taylor II, 892 F.2d at 506. The Seventh Circuit concluded "that *Pittston Coal Group's* reasoning requires us to apply the HEW rebuttal rules as well [as the invocation rules]." *Id.* at 508.[10]

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[9] The ALJ considered Taylor's claim first under section 727.203. The presumption was invoked by x-ray evidence. It was, however, rebutted under DOL's section 727.203(b)(2) because the medical evidence as a whole demonstrated that Taylor was not disabled for work as a result of any respiratory or pulmonary impairment (ergo he could not be totally disabled as a result of pneumoconiosis) (App. 37a-38a). Taylor is unable to work because he is 75 years old, obese, and suffers from syphillis, knee problems and non-occupational arteriosclerotic heart disease. The ALJ then reviewed the claim under section 410.490(c)(2). Noting a 1984 Sixth Circuit decision holding that only vocational evidence, but not medical evidence, could rebut the SSA presumption, the ALJ awarded benefits (App. 39a). Peabody appealed the ALJ's application of section 410.490. Taylor did not cross-appeal the denial of his claim under section 727.203(b), and has never contested the finding. The Benefits Review Board agreed that the ALJ erred in applying section 410.490(c)(2), and reversed on this basis (App. 26a-27a).

[10] The Seventh Circuit rejected a due process challenge, but not the one we ask this Court to consider. *See* 892 F.2d at 508. Following remand, both the Government and Peabody requested rebriefing and reargument in light of *Pittston Coal Group*. These requests were denied. In requesting rehearing, Peabody suggested that the court had considered the wrong constitutional theory.

The Government and Peabody petitioned for rehearing. Both sides argued, in light of statutory, legislative, and regulatory authorities, that SSA's presumption is functionally rebuttable by medical evidence demonstrating an absence of occupational disease or related total disability or death. Thus, there is no true tension between SSA's and DOL's rebuttal rules and the restrictivity prohibition of 30 U.S.C. § 902(f)(2) does not deactivate any part of the DOL rebuttal rules. The Seventh Circuit's conclusion directly violates at least four other specific provisions of the Act and operates to impose liability on mine owners for no particular reason at all.[11] The Government and Peabody also argued that 30 U.S.C. § 902(f)(2) would present significant constitutional difficulties as interpreted by the Court of Appeals.

The rehearing petitions were denied on February 1, 1990.

REASONS FOR GRANTING THE WRIT

The U.S. coal industry does not question its obligation to provide fair and adequate compensation to those who suffer the consequences of coal mine employment related black lung disease. The industry has made a substantial effort over the past two decades, working closely with Congress, the Department of Labor, the insurance industry and workers' representatives, to ensure the attainment of this mutual goal. The resultant federal program is uniquely generous to claimants, but still affordable and fair to the coal industry.

The Seventh Circuit has now informed the industry as well as DOL, twelve years after the fact, that they were duped.

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[11] The Seventh Circuit attempted no analysis of the SSA rebuttal rule or the Act as a whole. The court merely noted that the DOL rule contained two rebuttal standards not expressly stated in the SSA rule, 20 C.F.R. § 727.203(b)(3) and (4), and that the DOL rule expressly required the consideration of all relevant medical evidence while the SSA rule was silent on this point. *Taylor II*, 892 F.2d at 506 & n.3.

We are told, in effect, that Congress did not really mean to establish a black lung benefits program only to compensate the victims of this occupational disease, but that there was a hidden agenda. Indeed, what Congress really intended was to create an employer funded life, health, general disability, retirement and unemployment insurance program for coal miners and their families. The fact that it is called the black lung program is merely an irrelevant technicality.

The Third Circuit and the Sixth Circuit do not agree. More importantly, the Seventh Circuit has erroneously construed the Act, Congress's intent and the relevant agency rules. Its decision is a matter of considerable economic significance to Peabody, mine owners generally and their insurers, and it wrongly deprives all of them of the right to fairly contest questionable and clearly non-meritorious black lung claims.

I.

THE CIRCUITS DISAGREE

In holding that medical evidence is largely or entirely irrelevant in the rebuttal phase of a claim subject to an interim presumption,[12] the Seventh Circuit discussed and expressly rejected the contrary view of the Sixth Circuit. *Taylor II*, 892 F.2d at 506-07 ("We respectfully disagree, therefore, with our colleagues in the Sixth Circuit . . . ."). Before *Pittston Coal Group*, the Sixth Circuit held that Labor's ten-year invocation rule violated 30 U.S.C. § 902(f)(2), but that the Labor's rebuttal rules were not similarly flawed. *Kyle v.*

[12] The Seventh Circuit's preclusion of any reliance on medical evidence in the rebuttal phase prohibits rebuttal on the basis of even conclusive proof that the miner did not have pneumoconiosis or that the miner's disability or death was in no way related to pneumoconiosis under 20 C.F.R. § 727.203(b)(3) and (4).These rebuttal elements raise strictly medical questions that can only be addressed by medical evidence. In the Seventh Circuit they no longer apply. *Meyer v. Zeigler Coal Co.*, 894 F.2d 902, 905 n.3 (7th Cir. 1990).

Director, Office of Workers' Compensation Programs, 819 F.2d 139 (6th Cir. 1987), *cert. denied*, 109 S. Ct. 566 (1988). After *Pittston Coal Group*, the Sixth Circuit reiterated, 'We have explicitly declined, however, to extend our holding in *Kyle* to the regulations governing rebuttal of the interim presumption. . . . 'Part B cases are not applicable to Part C claims with respect to *rebuttal* . . . .' ". *Youghiogheny and Ohio Coal Co. v. Milliken*, 866 F.2d 195, 201 (6th Cir. 1989) (emphasis in original; citation omitted). "[M]edical evidence alone would suffice to rebut the Part C presumption." *Id.* at 202.

The Third Circuit addressed the issue in a case in which the miner's disability was not related, even in part, to coal dust exposure, thus establishing rebuttal of the DOL presumption under section 727.203(b)(3). On appeal, claimant contended that the SSA rule did not permit rebuttal by this method, and accordingly, the Labor rule was invalid. The Third Circuit upheld the validity of Labor's rule. *Bethenergy Mines Inc. v. Director, Office of Workers' Compensation Programs*, 890 F.2d 1295, 1300 (3d Cir. 1989), *reh'g denied*, 890 F.2d 1295 (3d Cir. 1990).[13]

Acknowledging the conflict between the Sixth and Seventh Circuits, the Third Circuit held:

> The purpose of the Benefits Act is to provide a recovery for a miner totally disabled at least in part by pneumoconiosis if the disability arises out of coal mine employment. 30 U.S.C. § 901(a); *Mullins v. Director*, 108 S. Ct. at 431. The administrative law judge made unchallenged findings . . . under 20 C.F.R. § 727.203 which established that [the miner's] disability did not arise even in part out of coal mine employment. Thus, even though the Benefits Act has a remedial purpose, it seems perfectly

[13] It is probable that a petition for a writ of certiorari will be filed in *Bethenergy Mines Inc.*

> evident that no set of regulations under it may provide that a claimant who is statutorily barred from recovery may nevertheless recover.
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> . . . [T]he only way in which we can affirm . . . is to hold that even though Bethenergy should, on the law and facts, have prevailed . . . , by reason of the presumptions and limitations on rebuttal it must be responsible for benefits. We decline to reach such an unjust result.

Id. at 1300 (citations and footnotes omitted).

The Fourth Circuit followed with two decisions more or less siding with the Seventh Circuit. *John Taylor v. Clinchfield Coal Co.*, 895 F.2d 178 (4th Cir. 1990), *reh'g denied*, No. 87-3852 (4th Cir. Apr. 20, 1990); *Dayton v. Consolidation Coal Co.*, 895 F.2d 173 (4th Cir. 1990), *reh'g denied*, No. 89-3203 (4th Cir. Apr. 20, 1990). In *John Taylor*, the ALJ invoked the Labor presumption on the basis of abnormal arterial blood gas test results,[14] but then found rebuttal under both of the "extra" DOL rebuttal provisions, sections 727.203(b)(3) and (b)(4). 895 F.2d at 179. The ALJ held that John Taylor did not have pneumoconiosis or any related

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[14] The SSA presumption does not permit invocation by blood gas test results. SSA treats blood gas evidence in a separate and more restrictive way than does DOL. 20 C.F.R. Part 410, subpart D Appendix. Arterial blood gas test results cannot diagnose pneumoconiosis or related disability. Abnormal blood gas components may be due to a vast array of illnesses, environmental factors, or the personal habits of the patient. A. Miller, *Pulmonary Function Tests in Clinical and Occupational Lung Disease* 162, 176, 186-87, 376-78 (1986).

disability. In *Dayton*, the presumption was invoked by pulmonary function test results,[15] but was found rebutted because Dayton was not disabled and did not suffer from pneumoconiosis. 20 C.F.R. § 727.203(b)(2), (4); 895 F.2d at 174.

In *John Taylor*, relying on its prior decision in *Broyles*, the Fourth Circuit held that section 410.490 applies in DOL claims as to all rebuttal elements.

> The rebuttal provisions of § 727.203(b)(3) and (4) allow the consideration of evidence disputing both the presence of pneumoconiosis and the connection between total disability and coal mine employment. As rebuttal under § 727.203 permits additional criteria by which more elements of statutory entitlement may be rebutted, the provisions are more restrictive than those found in 410.490 and their application violates 30 U.S.C. § 902(f)(2).

895 F.2d at 182-83. (In a footnote, the Court notes its disagreement with the Sixth Circuit. *Id.* n.2.)[16] *Dayton* followed *John Taylor*. 895 F.2d at 175.

It is likely that over 90% of all claims arise within the combined jurisdictions of the Third, Fourth, Sixth and Seventh Circuits. The disagreements among these circuits are clear.

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[15] The pulmonary function invocation values in both the DOL and SSA rules are "basically normal" values for retired miners and just below normal for younger miners. *See Pittston Coal Group*, 109 S. Ct. at 421; *id.* at 432-33 n.8 (Stevens, J., dissenting). Truly abnormal pulmonary function tests may detect disability, but are not diagnostic of black lung disease. A. Miller, *supra* note 14, at 4-5.

[16] Chief Judge Ervin dissented, noting constitutional and statutory problems with the result. 895 F.2d at 184 ("To preclude rebuttal with evidence that the miner either does not have pneumoconiosis or that his total disability did not arise out of coal mine employment is unacceptable to me.").

II.

NEITHER THE ACT NOR *PITTSTON COAL GROUP* COMPELS THE INVALIDATION OF DOL'S REBUTTAL REGULATIONS

A. DOL's Rebuttal Rules Are Not More Restrictive Than SSA's

The essential finding in *Pittston Coal Group* is that DOL's ten year invocation rule is more restrictive than SSA's counterpart. This is clear on the face of the rules. It is not clear that the same flaw infects the rebuttal side. DOL's rules specify, as does 30 U.S.C. § 923(b), that all relevant medical evidence must be considered. SSA's rule is silent.[17] It is not apparent why silence is construed as a "criterion" when the Act ultimately controls and is precisely in accord with the DOL requirement. *See Mullins Coal*, 484 U.S. at 149-50 (noting "the requirement of 30 U.S.C. § 923(b) that all relevant medical evidence be considered in adjudicating SSA claims was explicitly carried over into the Labor presumption's rebuttal section").

Neither is it apparent that SSA's presumption precludes rebuttal by proof that pneumoconiosis is not present or did not contribute to a miner's disability or death. Section 410.490(c)(2) is a shortened version of the statutory definition of a compensable disability. 30 U.S.C. § 902(f)(1)(A). SSA rebuttal rule (c)(2) cross-references another SSA regulation, section 410.412(a)(1), which again repeats the definition

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[17] A plain reading of SSA rebuttal section 410.490(c)(2) suggests no limitation on the type of evidence that could rebut. In another sense, if SSA wrote a rule precluding the consideration of medical evidence, the rule would directly contradict the Act and would be invalid. *See* 30 U.S.C. § 923(b). The Fourth and Seventh Circuits simply applied the SSA rule. But the SSA rule does not apply to DOL claims and it has never been subject to notice and comment with respect to any claims for which a mine operator may be liable. This suggests an interesting technique for circumvention of the rulemaking requirements of the APA and is considerable baggage to attach to the word "criteria."

and then cross-references still other rules, sections 410.424 to 410.426. Another SSA rule, section 410.422 also defines "total disability," cross-referencing section 410.424. We cannot make perfect sense of the hopeless tangle of SSA rules that are incorporated by reference into section 410.490(c), but they are incorporated and they contain significant provisions. For example, section 410.412(a)(1) defines total disability to be total disability "due to pneumoconiosis." Section 410.422(c) provides, "Primary consideration is given to the medical severity of the individual's pneumoconiosis (see § 410.424)." Section 410.426(a) provides, "A miner shall be determined to be under a disability only if his pneumoconiosis is (or was) the primary reason for his inability to engage in such comparable and gainful work. *Medical impairments other than pneumoconiosis may not be considered.*" (emphasis added).

This trail back through the body of SSA's permanent rules is just like the one followed in *Pittston Coal Group*, and there, it was the only authority permitting this Court to conclude that DOL's ten-year rule was more restrictive than SSA's equivalent rule. 109 S. Ct. at 417-19.

The same analytic format validates DOL's rebuttal rules. The SSA rules incorporated into section 410.490(c) plainly emphasize the primary significance of medical evidence and preclude an award where pneumoconiosis is not a significant factor in a miner's disability. Ipso facto, if the disease is absent, it was not a significant factor. DOL's rules clarify SSA's morass by making explicit what is buried, but they are not more restrictive.[18]

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[18] In testing comparative restrictivity, the courts (with the exception of the Third Circuit) do not measure SSA rules against DOL rules. They compare DOL's rules to their decisional law, all of which ignores the specific text of SSA's rules for no stated reason. Because the courts of appeals' decisions in question all post-date the relevant enactment, they could not have served to inform Congress.

B. The Act Requires DOL to Permit Rebuttal by Medical Evidence

However clear the term "criteria" may have been in the *Pittston Coal Group* setting, it is not an inherently precise term. It must be interpreted in context and in light of related provisions. *See Dole v. United Steelworkers of Am.*, 110 S. Ct. 929, 934-35 (1990). The Seventh Circuit interprets "criteria" to mean that black lung disability benefits must be paid by mine owners even though the best medical evidence proves that the miner has no such disease or disability. This result cannot be squared with specific provisions of the Act.

First, section 422(c) provides, "[N]o benefit shall be payable by any operator on account of death or total disability due to pneumoconiosis . . . which did not arise, at least in part, out of employment in a mine during a period after December 31, 1969, when it was operated by such operator." 30 U.S.C. § 932(c); *see id.* § 932(h). Section 413(b) directs the adjudicator to consider all relevant evidence, expressly including the types of medical evidence that might demonstrate the absence of disease or disability. 30 U.S.C. § 923(b). This is not merely a rule of admissibility. It is a substantive direction admonishing the agencies that they may not casually overlook relevant facts properly brought to their attention. The Seventh Circuit's decision repeals these important protections.

Generally, the Act does not confirm any interpretation that simply writes pneumoconiosis or related disability out of the picture. Section 402(f)(1)(A), the section authorizing the agencies to write eligibility regulations, mandates rules that provide benefits only when "pneumoconiosis"[19] prevents the miner from working. 30 U.S.C. § 902(f)(1)(A). The Act's statement of purpose very clearly limits its objective to the

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[19] Pneumoconiosis is defined by the Act to mean a respiratory or lung disease or its sequelae arising out of coal mine employment. 30 U.S.C. § 902(b).

compensation of total disability or death due to pneumoconiosis. *Id.* § 901(a).

There is, in sum, nothing in the Act that accommodates the interpretation of "criteria" adopted by the Seventh Circuit. In *Pittston Coal Group*, this Court reallocated burdens of proof in DOL black lung claims, finding that the agency had not allocated them correctly in writing its rules. It is a far different matter, and almost surely inappropriate, to directly change the stated purpose of the Act by the interpretation of only one of its words. *See Massachusetts v. Morash*, 109 S. Ct. 1668, 1673 (1989). The proper mode of construction effectuates all of the provisions of the Act. *Ruckleshaus v. Monsanto Co.*, 467 U.S. 986, 1018 (1984) (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)). The Seventh Circuit's approach does not do so.

Legislative guides uniformly confirm Congress's intent to permit rebuttal in light of relevant medical evidence. The Conference Report accompanying the 1978 amendments instructs DOL to write its own interim presumption ensuring the consideration of all relevant medical evidence. H.R. Conf. Rep. No. 864, 95th Cong., 2d Sess. 16 (1978), *reprinted in* 1978 U.S. Code Cong. & Admin. News 308, 309. Several members of the Conference Committee emphasized the point in final debate before enactment. 124 Cong. Rec. 2333 (1978) (statement of Sen. Javits); 124 Cong. Rec. 3426, 3431 (1978) (statements of Reps. Perkins and Simon). There is absolutely nothing to indicate any intent either to limit or preclude the consideration of any kind of medical evidence or otherwise require benefit payments on account of anything but pneumoconiosis and related total disability or death.

The DOL rebuttal rules cannot fall on any traditional analysis of their validity.

C. The Constitutional Questions May Be Significant

The Seventh Circuit's opinion is generic. It holds that medical evidence is incompetent. It follows with certainty

that no claim in a rebuttal posture can be denied merely because pneumoconiosis is absent or a miner's disability or death is unrelated to his or her employment. The presumption, thus, compels false conclusions by precluding inquiry into the truth in every case. It is a purely arbitrary rule because it conclusively allocates blame and liability to an employer for harm to its employee that either does not exist or is not attributable to the employment relationship.

This Court has twice before expressed its constitutional concerns in similar settings. In the early 1970s, mine operators brought a direct constitutional challenge to a perceived limitation on rebuttal of a statutory black lung presumption, 30 U.S.C. § 921(c)(4). In reversing the lower court's declaration of unconstitutionality, this Court construed the presumption so that it would not, in any way, restrict a mine operator's ability to litigate a non-meritorious claim. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. at 35-37. Chief Justice (then Justice) Rehnquist and Justice Stewart concurred, noting that the presumption did not restrict the full litigation of any element of the claim. *Id.* at 51. It is apparent, however, that all members of the Court were troubled by the notion of precluding a fair opportunity to defend. A similar concern was expressed in this Court's first review of the interim presumption. *Mullins Coal Co.*, 484 U.S. at 157-59 & n.30 ("But if a miner is not actually suffering from the type of ailment with which Congress was concerned, there is no justification for presuming that that miner is entitled to benefits."); *see also id.* at 440 n.32 ("Lurking beneath the surface of this case is the constitutional concern that there must be 'some rational connection between the fact proved and the ultimate fact presumed.'" (citation omitted)).

The validity of evidentiary devices under the Due Process Clause depends "on the strength of the connection between the particular basic and elemental facts and on the degree to which the device curtails the fact finder's freedom to assess the evidence independently." *Id.* at 439 n.30 (quoting

County Court of Ulster County v. Allen, 442 U.S. 140, 156 (1979)). It is hard to see how, under the Seventh Circuit's reading, this test is met by section 410.490. Under the lower court's theory, a presumption of total disability or death due to pneumoconiosis is established by x-rays, ventilatory or blood gas tests meeting specified values, or other proof that the miner has or had severe lung disease. Yet the employer is permitted to rebut only if the miner is working or able to work. On its face, such a presumption is illogical, but upon closer analysis, it is patently irrational. Chest x-rays are incapable of showing the cause of total disability or death. *See Usery v. Turner Elkhorn Mining Co.*, 428 U.S. at 6-7 & n.2. Abnormalities shown on the x-ray are not necessarily related to coal dust exposure.[20] Blood gas and pulmonary function studies are non-diagnostic and any abnormalities they show may be due to a host of illnesses or personal characteristics of the patient. *See supra* notes 14, 15. The pulmonary function invocation values in the rules are normal for older persons. The SSA rule, as read by the court below, would not accommodate rebuttal at all if the miner was deceased.

In this setting, a deceased drug user (drug use affects blood gases) who dies from an overdose may be irrebuttably presumed to have died due to pneumoconiosis. A normal, healthy retiree may be irrebuttably presumed totally disabled due to pneumoconiosis. A lifelong cigarette smoker with disease attributable solely to that habit is automatically entitled. These are not isolated cases, and the reporters are filled with claims very much like these, most of which are denied under DOL's rules. If 30 U.S.C. § 902(f)(2) requires employers to pay benefits in these cases by irrevocably deeming drug use, cigarette smoking, automobile accidents and the like to be disabling or fatal black lung disease, the presumption is

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[20] Pendergrass, *et al.*, *Roentgenological Patterns in Lung Changes That Simulate Those Found in Coal Workers' Pneumoconiosis*, 200 Annals N.Y. Acad. of Sci. 494 (1972); Lapp, *A Lawyer's Medical Guide to Black Lung Litigation*, 83 W. Va. L. Rev. 721, 730 (1981).

purely arbitrary. The rule forecloses all reasonable inquiry into the truth of the matter. It completely curtails the fact finder's ability to assess the evidence independently because it makes medical evidence, the only evidence that matters, incompetent as a matter of law. And the connections between predicate and ultimate facts are exceptionally weak. It is hard to see how this passes due process muster at any level of scrutiny.

In a procedural sense, the mine operator has a right to a fair hearing before it may be obligated to transfer its property to a claimant. The right to show up at trial is not the right protected by the Due Process Clause — it is the "opportunity to present [the] case and have its merits fairly judged" that matters. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982). If the only way to prove an employer's lack of involvement in a miner's disability or death is by medical evidence, as it is in a black lung claim, the preclusion of the fact finder's consideration of medical evidence makes the trial irrelevant process, not due process of law.

In Hubert Taylor's case, Peabody has proven and Taylor has not challenged the fact that Taylor's employment with Peabody caused no disability. The constitutional predicate for requiring disability payments by Peabody is elusive at best.

III.

THE ISSUES ARE IMPORTANT

Peabody and Old Republic together face liability in from 500 to 700 claims directly affected by the decision below. It is estimated that from 3,000 to 7,000 additional claims remain pending. The average indemnity cost of an older black lung claim ranges from $118,000 to more than $186,000. U.S. Dep't of Labor, *1980 Ann. Rep. on Admin. of the Black Lung Benefits Act* 32 (1981). Interest, health care and transactional

costs may double these amounts. The amount at stake is substantial.

Of equal significance is the fact that these liabilities are unfunded. Twelve years ago, Congress mandated the application of some kind of interim presumption in many DOL claims. The regulations duly promulgated at that time assured industry that it would be responsible for benefits only on account of total disability or death due to occupational pneumoconiosis, and afforded a fair opportunity to defend non-meritorious claims. The insuring and self-insuring arrangements entered into to fund these liabilities were financed on reasonable expectations of loss experience that seemed justified at that time in light of DOL's rules. It is not possible to go back to fix a mistake. Risk of error is, of course, a feature of all insuring arrangements. It is, however, unjust for Congress to require private funding of a specific occupationally related disability or death, while a hidden agenda contemplates liability vastly exceeding the scope of the risk assigned. It is not probable that Congress intended this deception.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

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